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JAMES R. BROWNING, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 1

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners,

v.

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

COLONIAL SAND AND STONE CO., INC., Petitioners,

v.

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 1

Robert Aquilino and Joseph Spero, doing business as Home Maintenance Company, Petitioners,

v.

United States of America, Ada Bottone, Fleetwood Paving Corporation, and Colonial Sand and Stone Co., Inc.,

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Colonial Sand and Stone Co., Inc., Petitioner,

v.

United States of America, Ada C. Bottone, doing business as Mario's Miramare Restaurant,

Fleetwood Paving Corporation, Robert Aquilino and Joseph Spero, doing business as Home Maintenance Co.

PETITIONER'S REPLY BRIEF

The Fund in Question Is Not the Property of the Taxpayer as a Matter of State Law, Nor Did the New York Court of Appeals Below Decide it Was.

Respondent in its brief contends that the New York Court of Appeals, in the instant case below, decided that the fund in question was, as a matter of state law, prop-

erty of the taxpayer to which the federal tax lien could attach. After admitting and taking unto themselves petitioner's argument that the determination of what is "property" or "rights to property" is a matter to be ascertained by reference to and on the basis of state law, they rely, in essence, upon (a) certain language quoted out of context from the opinion below, and (b) three cases,[1] two in the New York Court of Appeals and one in the Court of Appeals for the Second Circuit, to establish that the Court below did decide such question on the basis of state law.

Respondent's reliance upon the quoted language (Respondent's brief, pp. 12-13) and opinions is patently unfounded and erroneous. First, the language from the opinion of the court below, when read in conjunction with the paragraph immediately following that quoted by respondent, supports petitioner's contention that state law was *not* applied. The Court there stated that,

> "It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land. (Citations omitted.) That being so, it follows that the provision in this state's Lien Law, to which respondents (here, petitioners) point—that funds received by a contractor from the owner for the improvement of real property shall be deemed 'trust funds' for the payment of subcontractors (§ 36-a, § 13, subd. [7])—*may not* be construed to affect the rights of the government or the priority of its tax lien." (Emphasis supplied.) (R. pp. 68-69)

The Court's note to such statement, to wit, that "To the extent that *Cranford Co.* v. *Leopold & Co.* (189 Misc.

[1] *Raymond Concrete Pile Co.* v. *Federation Bank & Trust Co.*, 288 N. Y. 452; *Saltser & Weinsier, Inc.* v. *Monroe Plumbing and Heating Supply Corp.*, 290 N. Y. 903; *Gramatan-Sullivan, Inc.* v. *Koslow*, 240 F. 2d 523.

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3, 391-392, affd. 273 App. Div. 754, affd. 298 N. Y. 676), ggests the contrary, *it must give way to more recent leral decisions"* (Emphasis supplied) illuminates the urt's deference to inapplicable federal decisions therein ed even more clearly since it specifically subjugates, does not overrule, an applicable state decision. The urt specifically "gives way to more recent federal de-ions"—yet respondent contends that they applied state , a proposition which is clearly negatived by the fore-ng language of the court.

The two cases decided by the New York Court of Ap-ls upon which respondent relies (*Raymond Concrete e Co.* v. *Federation Bank,* 288 N. Y. 452; *Saltser & insier, Inc.* v. *Monroe Plumbing and Heating Supply p.,* 290 N. Y. 903) constituted a construction of the Lien v as it existed *prior to* the 1942 amendment to said v.[2] Petitioner would assume that respondent was un-ıre of the vitiating effect upon these decisions of the 2 amendment, were not the impact of that legislation set h in detail in the dissenting opinion of Chief Judge rk in *Gramatan-Sullivan, Inc.* v. *Koslow,* 240 F. 2d 523, iorari denied, 353 U. S. 958[3]—a case which is also d by the respondent.

he New York Law Revision Commission did not have pportunity to comment upon the *Raymond* case, in its

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L. 1942, c. 808.

Chief Judge Clark there stated: "My brethren cite *Raymond rete Pile Co.* v. *Federation Bank & Trust Co.,* 288 N. Y. 452, . E. 2d 486, as requiring this result. Even if that case sup-d the defendant's view, it would not help us here, inasmuch e case involved the original trust fund provisions before the al 1942 amendments. Since the opinion of the Court of als was filed after the Law Review Commission completed its , the Commission had no opportunity to say how much of that on remained good law after passage of the amendments. The nission did approve the Appellate Division result, however, the Court of Appeals reversed. The first ground of the opinion—that the trust fund sections are only criminal and not -was clearly overruled by the amendments."

Report,[4] since that case was decided by the New York Court of Appeals *after* the Commission's report was rendered. However, the report did comment with favor upon the Appellate Division decision in that case which was reversed. The Commission's recommendation was adopted by the legislature, and said 1942 amendment clearly evidences a legislative intent to uphold, approve and codify the opinion of the *Appellate Division.* The Court of Appeals in the *Raymond* case predicated its opinion upon (1) lack of evidence, and (2) a conclusion that § 36-a of the Lien Law was solely penal in nature and provided no concurrent civil remedy. The evidentiary basis for their decision is not relevant here, and the 1942 amendment to § 36-a does specifically provide a civil remedy. Thus, since said 1942 amendment, the Court of Appeals decision in the *Raymond* case is meaningless and no longer authority in the State of New York.

The *Saltser* case also arose prior to the 1942 amendment. That decision states that "no rights accrued to plaintiff by virtue of the Lien Law (§ 36-a) in the absence of the filing of a lien by plaintiff." The statute, as amended in 1942, states: "Such trust may be enforced by civil action * * * by any person entitled to share in the fund, *whether or not he shall have filed, or had the right to file a notice* of lien * * *." (Emphasis supplied.) Thus, the holding in the *Saltser* case was also clearly overruled by statute.

Gramatan-Sullivan, Inc. v. *Koslow, supra,* is not authority in the State of New York, having been decided by the Court of Appeals for the Second Circuit, which, as respondent agrees (Respondent's Brief, P. 13) does not have the "final word." The substantive error of the opinion is adequately presented by Chief Judge Clark in his dissent from that opinion, which "adopt[ed] a construction of the

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[4] "Act, Recommendation and Study relating to the Trust Fund Provisions of the Lien Law," 1942 Report, New York State Law Revision Commission.

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amended statute which war[red] with its language, its legislative history, and New York case law, and which clash[ed] with other parts of the statutory scheme.'"[5] The New York Legislature has eliminated all doubts raised by that opinion by once again amending the lien law.[6] The Legislative reports[7] specifically deal with the *Gramatan-Sullivan, Inc.* case. and clearly indicate that such decision did not set forth an accurate statement of the New York Lien Law. The Report states that "The principal purpose of those amendments [1958] was to make it clear that the right of trust beneficiaries to enforce the trust in a civil action does not depend on the time when their claims arose or matured, and that application of trust funds to a purpose other than payment of trust claims is a misappropriation unless all trust claims then in existence or later arising are satisfied." The amendments thus attempted to resolve the problems raised by the *Gramatan-Sullivan, Inc.* v. *Koslow* case. Other considerations delayed the enactment of this legislation until 1959, but the delay in no way diminishes the legislature's disapproval of that case.

Thus, none of the cases cited by respondent are valid, subsisting expressions of the status and effect of the New York Lien Law.

The decision of the New York Court of Appeals in *In Re Washington Square Slum Clearance; United States* v. *Coblentz*, 5 N. Y. 2d 300 was based upon that court's recognition of petitioner's argument that state law must control the definition of property—a recognition inspired by this court's decision in *United States* v. *Bess*, 357 U. S. 51. There, the Court's citation of the instant case below indicated that it was thinking of the instant case in terms of

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[5] *Gramatan-Sullivan, Inc.* v. *Koslow* (dissenting opinion), 240 F. 2d 523 at 530-1.

[6] L. 1959, C. 696.

[7] "Trust Fund Provisions of the Lien Law," 1959 Leg. Doc. No. 65(F).

perfection of lien under § 3672 (26 U.S.C. 1952 Ed., Sec. 3672), rather than as a question of what constitutes "property" of the taxpayer under § 3670 (26 U.S.C. 1952 Ed., Sec. 3670). Factually, the court in the instant case did not reach the question of whether the fund in question herein constitutes "property" or "rights to property" of the taxpayer—the determination of which is essential to the proper disposition of this case.

Respondent herein begs the question when it states that the subcontractor under New York law may not enforce his lien if the general contractor has already been paid by the owner, since the trust fund provisions of the Lien Law seek, in part, to remedy this very problem. It was to prevent the general contractor from obtaining payment from the contractor and leaving the subcontractor without remedy that the legislature established the trust and included therein, as part of the trust *res*, any monies or indebtedness due or to become due from the owner to the general contractor.

Contrary to respondent's contention that petitioner's reference to *Fidelity & Deposit Co. of Maryland* v. *New York City Housing Authority*, 241 F. 2d 142, is "beside the point," the underlying philosophy of the Lien Law—the protection of the small and otherwise defenseless workman or subcontractor—indicates that the concurrent authority of *Fidelity & Deposit* and the decision below should not exist. The government states that "it is not unusual that parties by contract may change their respective property rights"—which is true. However, it is not usual that parties may do by contract that which the legislature is unable to do by statute—which would be the situation here. An affirmance of this decision would be equivalent to a pronouncement that well-advised subcontractors may protect themselves against the federal tax lien, but the small workman or subcontractor for whom the Lien Law was enacted is without defense.

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We do not believe that petitioner's brief contains any distortion of the sense and meaning of either the *Fidelity & Deposit Co.*, case or its comment on *United States* v. *Kings County Iron Works*, 224 F. 2d 232. Careful analysis of the language quoted from the opinion in the *Fidelity & Deposit* case, when read in conjunction with the *Kings County* case, reveals that the Court in *Fidelity & Deposit* recognized, as was indeed the case, the fact that the Court in *Kings County* did not inquire into the rights of the taxpayer, if any, in the fund, but rather assumed that such rights existed.[8]

Respondent Has No Lien Against the Real Property Belonging to the Owner, and Therefore Has No Right to the Fund Substituted Therefor.

Respondent's statement that petitioner's argument, which established that the fund which was substituted for the real property herein was not subject to the federal lien, was addressed to the place of filing is completely untrue. Petitioner's contention (Br., p. 25-27) is addressed to the fact that respondent's claim is derivative—and, with respect to the real property or the fund substituted therefor by statute, cannot rise higher than the claim of the tax-

[8] The court in *Kings County* stated: "Nor can Standard's [the owner's] refusal to surrender these moneys be justified by reference to provisions in its contract with Preferred [the taxpayer] concerning payment of subcontractors. Such private contractual arrangements are clearly subordinate to the paramount rights of the government to levy on the property of its taxpayers" (224 F. 2d at 236). The court there clearly assumed that the moneys were the property of the taxpayer—an unwarranted assumption which the court in *Fidelity & Deposit* recognized in the language quoted by petitioner (Petitioner's Brief, pp. 18-19). The court in *Fidelity & Deposit* specifically disapproved of the language above quoted, stating: "But here we are concerned with the question of whether or not a contractual right exists and that we hold is a matter of state law only." The court in *Fidelity & Deposit* was not, as respondent contends approving the decision in *Kings County;* it was distinguishing that decision by demonstrating the erroneous assumption made by the court.

payer. As a result, the federal lien can attach only to the taxpayer's rights to the real property—which rights are subordinated by statute to those of the petitioner. The federal lien may be effective without filing, but it does not operate to perfect the claim of the taxpayer. This is a fundamental distinction between this case and the line of cases commencing with *United States* v. *Security Tr. & Savings Bank*, 340 U. S. 47—in those cases the parties were claiming funds which indisputably belonged to the taxpayer.

This Case Is an Appropriate Vehicle for Re-examining the Rule Granting Absolute Priority to the Federal Lien, and That Rule Should Be Changed.

The instant case and its companion—*United States* v. *Durham Lumber Co.*, No. 23, this Term, clearly raise the problems flowing from the *Security Trust* decision, and a reconsideration of the issues raised therein bears directly upon the decision herein. Should the court decide, as Petitioner contends, that the federal lien is entitled to no different treatment than a judgment lien under state law, as a matter of state law petitioner's lien must prevail. Therefore, the issues as raised in petitioner's brief are clearly relevant.

Respectfully submitted,

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